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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1410

KENNETH ROBERTS, *et al.*,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Petitioners, Kenneth Roberts, et al, petition this Court for a Rehearing on Petition for Writ of Certiorari to Review the Judgment of the United States Court of Appeals for the Tenth Circuit. In support of the Petition for Rehearing, Petitioners show to Court as follows:

GROUNDS FOR REHEARING

A. The Tenth Circuit Court of Appeals entered a final judgment and Order in the above cause upholding jurisdiction of the United States District Court in adjudicating the validity or invalidity of unpatented mining claims, under the guise of a quieting of title action. In order to preserve the uniformity of decisions by this Honorable Court, as to jurisdiction, that is, whether adjudication of unpatented mining claims is vested solely in the Land Department or, concurrently, in the Land Department and the Federal District Courts, a rehearing on the Petition for Writ of Certiorari is imperative in order to invoke this Court's power of supervision over this action where the lower courts have so far departed from the accepted and usual course of judicial proceedings or, in the very least, the Court of Appeals has so far sanctioned such a departure by the lower court. Further, the Tenth Circuit Court of Appeals has decided a federal question in a way which conflicts with the applicable decisions of this Court.

B. The care and disposal of public lands is vested in the United States Congress. The Congress has the power to dispose of and make all needful rules and regulations respecting the territory and other property belonging to the United States. *U. S. Const. art. IV. #3, cl. 2. Article IV, supra*, permits and authorizes the Congress, and its agents, to act or authorize others to do so, to exercise that authority in an exclusive, proprietary, absolute, plenary, complete, and unlimited way. *Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 295 (1958); Alabama V. Texas, 347 U.S. 272, 273, 274 (1954); United States v. San Francisco, 310 U.S. 16, 30 (1940); Sinclair v. United States, 279 U.S. 263, 294 (1929);*

Utah Power & Light Co. v. United States, 243 U.S. 389, 404 (1917); United States v. Midwest Oil Co., 236 U.S. 459, 474 (1915); Van Brocklin v. Tennessee, 117 U.S. 151, 168 (1886); Gibson v. Chouteau, 80 U.S. (13 Wall.), 92, 99 (1872); Witherspoon v. Duncan, 71 U.S. (4 Wall.) 210, 219 (1867);

C. If patents have not issued by the Land Department, controversies over the claims should be solved by appeal to the land department and not to the courts. *Brown v. Hitchock, 173 U.S. 473, 477, 19 S. Ct. 485 (1899); Northern P. R. Co. v. McComas, 250 U.S. 387, 392, 39 S. Ct. 546 (1918).*

D. A Federal District Court has no subject matter jurisdiction to determine the validity of unpatented mining claims since Congress has given to the Department of the Interior the primary authority for administration and disposition of the public lands. *30 U.S.C. 21, et seq.; Best v. Humboldt Placer Mining Company, 371 U.S. 334, 83 S. Ct. 379 (1963); Del Monte Mining Co. v. Last Chance Mining Co., 171 U.S. 55, 66-67 (1898); Cosmos Exploration Co. v. Gray Eagle Oil Co., 190 U.S. 301, 23 S. Ct. 692, 24 S. Ct. 860.*

E. This Court, in previous decisions, has never expressly or impliedly, ruled that the question of jurisdiction of the disposal of public lands is concurrently within the sphere of the legislature or Congress and the Federal Courts. Compare, *Sioux Tribe v. United States, 316 U.S. 317, 324-336 (1942);* But see, *Boesche v. Udall, 373 U.S. 472, 83 S. Ct. 1373 (1963);* The Secretary's plenary authority, as head of an executive department, to promulgate regulations for the government of his department includes the power to provide for administrative appeals within the agency

and not to the Courts. *Davis, Administrative Law #8.18.*

CONCLUSION

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that, upon further consideration, writ of certiorari issue to the United States Court of Appeals for the Tenth Circuit.

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CERTIFICATE OF COUNSEL

I, Clement Theodore Cooper, counsel for the above-named petitioners, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Rule 58, subdivision 2, of the Rules of this Court.

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Petition for Rehearing on Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, was served, personally, on Robert H. Bork, Solicitor General, Department of Justice, Washington, D.C. 20530, this day of October, 1975.

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